

## CHAPTER 12

# Deeds And Gifts

### PRELIMINARY REMARKS

Chapters 12 through 16 deal with the individual dispositive devices. No study of the evasion cases would be complete unless the cases are considered from this viewpoint. The significance of a given decision depends in large part on the device under litigation. These devices differ in function and in social and economic utility. Thus we should expect a gift *causa mortis* to be more vulnerable to the widow's claim than would be an irrevocable trust; the "reliance interest" of the transferee is slight in the first example, normally higher in the latter example. Similarly, the donee of an *inter vivos* gift is more likely to be harmed by "invasion" by the widow than is the beneficiary of a United States savings bond payable on death. Each device poses its own problems. Those problems must be investigated before we can decide on the precise language of statutory reform.

Chapters 12-16 are concerned with postnuptial devices. Antenuptial transfers are dealt with in Appendix A, *infra*. Contracts to make a will are covered in Appendix B, *infra*. There is, of course, an affinity between postnuptial transfers, antenuptial transfers, and contracts to make a will. Each of these transactions operates to deplete the amount of property available for the support of the widow; litigation over widow's rights in each transaction usually concerns second or third marriages; and each transaction raises questions about the community values implicit in protection against disinheritance of the surviving family. Nevertheless, separate treatment seems to be warranted for the two latter transactions. Antenuptial transfers involve fraud in the traditional sense of active or implied representations inducing

reliance. The question of spouses' rights in contracts to make a will invariably concerns antenuptial contracts; and, even when the contract is postnuptial, the transaction is not a voluntary one: consideration is needed. Accordingly, neither transaction is affected by the provisions of the model statute in Chapter 22.

### 1. DEEDS

Probably most practicing lawyers at one time or another have had to consider the legality of a deed that actually is not to take effect until death. The following skeletal fact situation illustrates the problem as it usually arises in the evasion field. A husband, living with his second wife, makes a voluntary conveyance of all his realty to his children by a former marriage. The husband reserves a life estate and continues to deal with the land as if he still owns it. The deed is kept secret from the wife and is not recorded by the children until after the father's death. Omitting the question of homestead protection (where the family home is involved) or inchoate dower (where still in effect), does the widow have any rights in the land?

Such a deed may really be a sham transaction, depending on the remaining facts. As we saw in Chapter 9,<sup>1</sup> to establish that it is a sham (or "colorable"), the widow would need to show that the grantor and grantee did not consider the deed to be effective between themselves. Such a situation would arise, where the husband might say, in effect, to the children: "Well, if the old girl survives me, this is it — record it right after my death; but if she dies before I do then I'll take it back." The deed would have *inter vivos* validity, however, if the arrangement was so stated: "You take this, and it's yours whether my wife predeceases me or not: but, to save trouble, let us keep it quiet — don't record it until I die." Here the parties intend the deed to have immediate effect.

<sup>1</sup> See *supra*, Chap. 9:3(a).

The deed will probably be deemed testamentary<sup>2</sup> whenever the power to revoke is formally retained. Nor is it material that the power to revoke was retained in substance only. For example, in one case the surviving spouse prevailed when the decedent spouse procured a power of attorney from the donee. The power of attorney was signed in advance of the deed, and authorized the decedent "to sell and convey, mortgage or otherwise dispose of the property."<sup>3</sup> In many evasion cases, however, the evidence is inconclusive as to whether or not the power to revoke or recall was retained, or whether or not the deed was intended to have inter vivos effect between the parties. This may perhaps explain the confusing tendency of the courts to describe these transactions as being both "colorable" (meaning void) and "illusory" (meaning, in most instances at least, valid for ordinary purposes but defeasible by the widow).<sup>4</sup>

The evasion decisions are not as numerous as might be expected.<sup>5</sup> As with the cases involving other inter vivos devices, they exhibit an inarticulate tendency to balance the equities.<sup>6</sup>

<sup>2</sup> When a deed is to take effect on delivery it generally will not be deemed testamentary, in the absence of a clause stating that the deed covers all property owned at death, or (perhaps) in the absence of a revocation clause. Atkinson, WILLS, §43 (2d ed. 1953); 3 AMERICAN LAW OF PROPERTY §§12.65, 12.66. As to the effect of a clause stating that a deed is not to take effect until death, see notes: 17 MICH. L. REV. 413 (1919), 32 VA. L. REV. 148 (1945), Annot., 31 A.L.R.2d 533 (1953).

<sup>3</sup> Sanborn v. Lang, 41 Md. 107, 117 (1874); *accord*, Jaworski v. Wisniewski, 149 Md. 109, 131 Atl. 40 (1925) (deed to straw man, reconveyance of life estate, with power to sell both life estate and remainder); Brownell v. Briggs, 173 Mass. 529, 54 N.E. 251 (1899); *cf.* Thomas v. Louis, *infra*, note 4.

<sup>4</sup> *E.g.*, Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953); *cf.* Thomas v. Louis, 284 App. Div. 784, 135 N.Y.S.2d 97, 98 (3rd Dep't 1954); see also Hoffman v. Hoffman, 144 N.Y.S.2d 855 (Sup. Ct. 1955) (deed to spouse).

<sup>5</sup> Possibly because counsel for the surviving spouse considers the immunity of most deeds to be self-evident. The existence of inchoate dower serves also to narrow the field.

<sup>6</sup> The following cases are in addition to those otherwise noted. (a) *Cases favoring the surviving spouse.* Newton v. Newton, 162 Mo. 173, 61 S.W. 881 (1901); Dyer v. Smith, 62 Mo. App. 606 (1895); Mottershead v. Lamson, 101 N.Y.S.2d 174 (Sup. Ct. 1950); Brewer v. Con-

A deed that has "reality" would be effective against the widow in any jurisdiction that purports to employ that rationale.<sup>7</sup> Retention of possession or of a life estate would thus be immaterial,<sup>8</sup> provided, of course, delivery has been effected.<sup>9</sup>

The widow may prevail, of course, under either the "control" or "intent" rationales. Indeed, she may win even though the decedent did not formally reserve the power to revoke, either explicitly or in substance. For example, in *Gillette v. Madden*,<sup>10</sup> a widower alleged that four months be-

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nell, 30 Tenn. 343 (1851); *London v. London*, 20 Tenn. 1 (1839); *Hughes' Lessee v. Shaw*, 8 Tenn. 314 (1827); cf. *Jiggitts v. Jiggitts*, 40 Miss. 718 (1866) (widow prevails as to dower because of inadequate consideration, under unusual Mississippi dower statutes); *Weeks v. Weeks*, 265 App. Div. 942, 38 N.Y.S.2d 583 (2d Dep't 1942) (*mem. opin.*); *Jarnigan v. Jarnigan*, 80 Tenn. 232 (1883). See also *Rowland v. Rowland*, 34 Tenn. 350 (1855) (extent of defeasance); *Crain v. Crain*, 17 Tex. 80 (1856), 21 Tex. 790 (1858) (children's forced share). (b) *Cases favoring the donee*: *Cheatham v. Sheppard*, 198 Ga. 254, 31 S.E.2d 457 (1944); *Hoeffner v. Hoeffner*, 389 Ill. 253, 59 N.E.2d 684 (1945); *Whitehill v. Thiess*, 161 Md. 657, 158 Atl. 347 (1932); *Mitchell v. Mitchell*, 177 Misc. 1050, 1051, 32 N.Y.S.2d 839 (Sup. Ct. 1942), *rev'd*, 265 App. Div. 27, 37 N.Y.S.2d 612 (1st Dep't 1942), *aff'd without opinion*, 290 N.Y. 779, 50 N.E.2d 106 (1943); *In re Huntzinger's Estate*, 48 Sch. L. R. 18 (Pa. Orph. 1952); cf. *Million v. Botefur*, 90 Colo. 343, 9 P.2d 284 (1932); *Sorrels v. Sorrels*, 162 Ga. 734, 134 S.E. 767 (1926) (transfer to avoid alimony, husband dying before litigation); *Pruett v. Cowsart*, 136 Ga. 756, 72 S.E. 30 (1911); *Feighley v. Feighley*, 7 Md. 537 (1855) (alimony); *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902) (not a voluntary deed); *Radecki v. Radecki*, 279 App. Div. 1137, 112 N.Y.S.2d 764 (4th Dep't 1952) (*mem. opin.*); *Neville v. Sawicki*, 44 O.L. Abs. 408, 64 N.E.2d 685 (Ohio App. 1945), *aff'd*, 146 Ohio St. 539, 67 N.E.2d 323 (1946).

<sup>7</sup> *Osborn v. Osborn*, 102 Kan. 890, 172 Pac. 23 (1918); *Garrison v. Spencer*, 58 Okla. 442, 160 Pac. 493 (1916); *Farrell v. Puthoff*, 13 Okla. 159, 75 Pac. 96 (1903); cf. *Moedy v. Moedy*, 130 Colo. 464, 276 P.2d 563 (1954); *Sederlund v. Sederlund*, 176 Wis. 627, 187 N.W. 750 (1922) (delivery two years before husband meets second wife).

<sup>8</sup> *Blankenship v. Hall*, 233 Ill. 116, 84 N.E. 192 (1908) (recorded just before death); *Ellis v. Jones*, 73 Colo. 516, 216 Pac. 257 (1923). But a few older cases intimate that retention of any right, even of possession, would invalidate the deed, e.g., *Flowers v. Flowers*, 89 Ga. 632, 15 S.E. 834 (1892) (deed valid); cf. *McGee v. McGee*, 26 N.C. (4 Ired.) 77 (1843) (deed invalid).

<sup>9</sup> *Stewart v. Stewart*, 5 Conn. 317 (1824).

<sup>10</sup> 280 App. Div. 161, 112 N.Y.S.2d 543 (3rd Dep't 1952); see *Goewey v. Hogan*, 102 N.Y.S.2d 339, 341, (Sup. Ct. 1951); cf. *Courts v. Aldridge*, 190 Okla. 29, 120 P.2d 362 (1941) (deeds of all husband's realty three

fore death his wife had conveyed away her realty, and that the transfer was illusory because she had thereafter continued to exercise dominion and control, and also because the deed was not intended to take effect until death. The New York court held that a cause of action was stated. The *Halpern* case was distinguished on the ground that it applies only to Totten trusts; and *Krause v. Krause*<sup>11</sup> was distinguished on the ground that in the *Krause* case "no retention of power appeared on the face of the deeds." And in *Hastings v. Hudson* a Missouri court invalidated a deed when, although no life estate had been retained, the property had been "dealt with in the same manner after the transfer as it had been before."<sup>12</sup> Decisions like the *Gillette* case and the *Hastings* case defy analysis. Certainly the mere retention of a life estate is not the critical factor. All we can say is that in cases of this sort the widow's chances are good, but not a sure thing, if any two or more of the following factors are in her favor: (a) the equities are on her side,<sup>13</sup> (b) the decedent retained practical control or management of the realty involved, and (c) if the transaction was kept secret. These three factors are stated in the order of their probable importance. It might be supposed that secrecy would be irrelevant,<sup>14</sup> as being the normal thing when there is bad blood between the spouses. But some courts regard secrecy, particularly lack of recordation, as reprehensible. Said a Missouri court:

"The lack of courage to submit a matter involving

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weeks before second marriage; court delineates the factors constituting undue retention of control); *but cf.* *Harber v. Harber*, 152 Ga. 98, 108 S.E. 520 (1921) (life estate reserved, grantor to have full "control" and receive rents and profits; held, valid).

<sup>11</sup> 171 Misc. 355, 13 N.Y.S.2d 812 (Sup. Ct. 1939), *rev'd*, 259 App. Div. 1057, 21 N.Y.S.2d 341 (4th Dep't 1940), *modified*, 285 N.Y. 27, 32 N.E.2d 779 (1941).

<sup>12</sup> 359 Mo. 912, 924, 224 S.W.2d 945, 950 (1949); see *Smith v. Smith*, 22 Colo. 480, 46 Pac. 128 (1896) (actual control; recordation one day before death); *but cf.* *Phillips v. Phillips*, 30 Colo. 516, 71 Pac. 363 (1903), discussed *supra*, Chap. 9, text at note 62.

<sup>13</sup> *Cf.* *Schmidt v. Rebhann*, 108 N.Y.S.2d 441 (Sup. Ct. 1951) *complaint dismissed on merits*, 117 N.Y.S.2d 840 (1952).

<sup>14</sup> *E.g.*, *Jones v. Somerville*, 78 Miss. 269, 28 So. 940 (1900); also see *Glass v. Glass*, 86 So.2d 346, 348 (Miss. 1956) (separate maintenance).

mutual interest to mutual consideration is an index to the state of mind of the grantor to which the maxim that secrecy is a badge of fraud has peculiar application."<sup>15</sup>

## 2. GIFTS

(a) *Preliminary Remarks.* In our discussion of inter vivos gifts it is doubly important that we have a clear appreciation of the basic policy behind the statutory share. In the first place, the difficulty of using the traditional evasion theories to carry out that policy is accentuated in the gift cases. A mechanical application of those theories may unduly prejudice the widow. The "reality" test, for example, which bars the widow from *any* recovery, has had a long association with the gift cases. "Who so ignorant," said a judge well over one hundred years ago, "as not to know that a husband may dispose of his chattels during the coverture without his wife's consent, and freed of every post mortem claim by her; . . ." <sup>16</sup> And the "control" test (as best exemplified in the illusory transfer doctrine) is illogical when applied to gifts. Excessive retention of control <sup>17</sup> is not possible (in form, at least), because the donor lacks the power to revoke.<sup>18</sup> The gift, to be valid, must be "outright," or "absolute," to use terms frequently found in the cases to denote a transfer that will defeat the widow.

<sup>15</sup> *Headington v. Woodward*, 214 S.W. 963, 967 (Mo. 1919); also see *Sanborn v. Lang*, 41 Md. 107 (1874); *Brownell v. Briggs*, 173 Mass. 529, 54 N.E. 251 (1899); *Hastings v. Hudson*, 359 Mo. 912, 224 S.W.2d 945 (1949); *Gillette v. Madden*, 280 App. Div. 161, 112 N.Y.S.2d 543 (3rd Dep't 1952); *Goewey v. Hogan*, 102 N.Y.S.2d 339 (Sup. Ct. 1951); *Reynolds v. Vance*, 48 Tenn. 294 (1870).

On secrecy as an element in the Colorado cases, see *supra*, Chap. 9:3(b); Note, 45 MICH. L. REV. 914, 916 (1947).

<sup>16</sup> *Gibson, J.*, in *Ellmaker v. Ellmaker*, 4 Watts 89, 91 (Pa. 1835).

<sup>17</sup> If the gift is made close to death the donor has of course, retained "control" of the property concerned during most of his lifetime. As used in the evasion cases, however, "control" refers to powers formally retained in the instrument effecting the gift. See Chap. 7, *supra* at note 4.

<sup>18</sup> Except in certain limited situations, *e.g.*, engagement rings. Cf. Note, 12 MODERN L. REV. 380 (1949).

The requirements for making a gift are not onerous. There must be a donative intent; and there must be delivery, either of the subject matter or of a deed of gift. Retention of a life estate, or of possession, is permissible. For the husband who is determined to thwart his wife, the inter vivos gift involves the minimum in formalities, in legal fees, in taxes.<sup>19</sup> In brief, the only practical restraint on gifts appears to lie in the cupidity of mankind, in the natural reluctance to surrender title beyond recall.<sup>20</sup> But when death looms, when the husband is "in the sere and yellow leaf,"<sup>21</sup> even this instinct fails. Then it is that transfers are made solely with a view to post-mortem distribution. In the words of a Missouri court:

"Counsel . . . argue . . . that these deeds and gifts were not testamentary in their nature, but when we consider the age of Columbus T. Rice, that he had been stricken already with paralysis, and his numerous other afflictions, and his own declaration that he did not expect to live a year; that he was constantly in the care of physicians and that within less than six months before his death he had given his children and son-in-law practically the whole of his estate, whereas previous to that time he was known to be parsimonious and close-fisted and had been exceedingly meagre in his gifts to his children, we cannot avoid the conclusion that this sudden and unusual exhibition of generosity was the result of

<sup>19</sup> Epstein, "Inter Vivos Transfers: Gifts, Joint Ownerships, and Contemplation of Death," 1949 U. ILL. L. FORUM 18 (1949).

<sup>20</sup> In some cases the claimant prevailed simply because the alleged donor failed to observe the requirements for making a gift; *e.g.*, In re Waggoner's Estate, 5 Ill. App. 2d 130, 125 N.E.2d 154 (1955); In re Kellas' Estate, 40 N.Y.S.2d 655 (Surr. Ct. 1943); *aff'd*, 267 App. Div. 924, 1006, 46 N.Y.S.2d 884 (3rd Dep't 1944), *aff'd on other grounds*, 293 N.Y. 908, 60 N.E.2d 34 (1944); In re Youngerman's Estate, 38 N.Y.S.2d 646 (1942).

If the husband gives away an excessive amount of property the wife—if she moves fast enough—may have the transfers set aside in the husband's lifetime as being in fraud of her potential maintenance or alimony claim. *Cf.* Comment, "Donations Omnium Bonorum (Article 1497)" 6 LA. L. REV. 98 (1944).

<sup>21</sup> Dyer v. Smith, 62 Mo. App. 606, 610 (1895).

his expressed conviction that his days were numbered, and being thus warned of the approach of death he determined to distribute the estate which he could not hope to enjoy much longer.”<sup>22</sup>

And there is another reason for emphasizing basic policy factors. In a jurisdiction committed to either the “reality” or the “control” theory, a court may be tempted to assist a needy widow by tinkering with the rules concerning delivery. The very flexibility of those rules makes this solution an easy but an unfortunate one.<sup>23</sup> Our concept of delivery is now broader, more sophisticated than the early materialistic insistence on physical transfer.<sup>24</sup> Transfer of a deed of gift, or of a symbol, as indicative of the *animus donandi*, affords

<sup>22</sup> Gantt, J., in *Rice v. Waddill*, 168 Mo. 99, 118, 67 S.W. 605, 609 (1902).

<sup>23</sup> In *Hamilton v. First State Bank*, 254 Ill. App. 55, 59 (1929), a decedent procured two certificates of deposit payable “to the order of myself or Carrie Kern [a child of a former marriage] or the survivor of them on the return of this certificate properly endorsed.” He retained the certificates in his own possession until death. In sustaining the widow’s claim, the court stated: “Under the circumstances of the case it is wholly immaterial whether it was an attempted gift or whether it was the result of a contractual relation. In either event it was an attempted transfer without consideration and apparently for the purpose of defeating the marital rights of the widow. We are of the opinion that the transaction was not a perfect gift nor was it the creation of a joint tenancy.” It is cases of this sort that make the evasion jurisprudence so tantalizing. Is the court enunciating an “intent” test? Or are we to assume (a) that the transfer was an unreasonable one, and (b) that the court is deciding the case on the reasonableness factor? Or are we to assume that the transfer was ineffective, entirely aside from the rights of the widow? The law on this last point is not clear. One would expect that a valid joint tenancy was created: see Hemingway, “Joint Tenancy in Bank Accounts,” 10 CHI-KENT L. REV. 37, 44 (1931); but there is authority, in the non-evasion cases, refusing recovery to the survivor when a certificate of deposit provides for payment in the alternative to two or more payees; Annot., 171 A.L.R. 522 (1947). As to the evasion cases on joint tenancy and joint bank accounts, see pp. 212–220, *infra*.

<sup>24</sup> Holdsworth, 3 HISTORY OF ENGLISH LAW, 354–58 (5th ed. 1942); Mechem, “The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments,” 21 ILL. L. R. 341, 457, 568, (1926); *New York Law Revision Commission Act, Recommendation and Study Relating to Gifts of Personal Property Without Delivery*, Reports, 1943, pp. 95–126.

room for professional ingenuity.<sup>25</sup> And delivery may be made to a third party, to be handed over to the donee at the donor's death. Here the court may sustain the transaction, as a trust, or nullify it, as an agency.<sup>26</sup> And if delivery of the *res* is effected, but operation of the gift postponed until the death of the donor, its validity may hinge on the court's willingness to describe the contingency as a condition subsequent instead of a condition precedent,<sup>27</sup> or to apply the label of gift *causa mortis* instead of gift *inter vivos*. What must be kept in mind is that the policy concerning widow's support has nothing to do with the policy that is concerned with the rules on the normal validity of gifts. The modern concept of delivery expresses a community decision that gifts may be made with a maximum of convenience, provided there be a clear manifestation of donative intent. That concept should not be narrowed merely to assist the widow. What is needed is a reconsideration of the rules dealing with widow's rights.

(b) *Evasion Cases*. A list of evasion cases dealing with *inter vivos* gifts may be found in Table D, where the cases are classified as to the party that prevailed and also as to the type of property involved.<sup>28</sup> As far as the "reality" test is concerned, an *inter vivos* gift is of course valid<sup>29</sup> even though a

<sup>25</sup> As to future interests in personalty, see Simes and Smith, *LAW OF FUTURE INTERESTS*, §§351-71; Uniform Property Act, §3 (*UNIFORM LAWS ANN.*, Vol. 9A, 252 (1951)).

<sup>26</sup> Gulliver and Tilson, "Classification of Gratuitous Transfers," 51 *YALE L. J.* 1, 21 (1941).

<sup>27</sup> *Ibid.* 22, 23.

<sup>28</sup> *Infra*, p. 401.

<sup>29</sup> *Harris v. Spencer*, 71 Conn. 233, 41 Atl. 773 (1898); *Whidden v. Johnson*, 54 So.2d 40 (Fla. 1951); *Haskell v. Art Institute*, 304 Ill. App. 393, 26 N.E.2d 736 (1940); *Samson v. Samson*, 67 Iowa 253, 25 N.W. 233 (1885); *Poole v. Poole*, 96 Kan. 84, 150 Pac. 592 (1915); *Small v. Small*, 56 Kan. 1, 42 Pac. 323 (1895); *Wright v. Holmes*, 100 Me. 508, 62 Atl. 507 (1905); *Poole v. Poole*, 129 Md. 387, 99 Atl. 551 (1916); *Redman v. Churchill*, 230 Mass. 415, 119 N.E. 953 (1918); *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902); *Cranson v. Cranson*, 4 Mich. 230 (1856); *In re Schurer's Estate*, 157 Misc. 573, 284 N.Y. Supp. 28 (Surr. Ct. 1935), *aff'd without opinion*, 248 App. Div. 697, 289 N.Y. Supp. 818 (1st Dep't 1936); *York v. Trigg*, 87 Okla. 214, 209 Pac. 417 (1922); *Garrison v. Spencer*, 58 Okla. 442, 160 Pac. 493 (1916); *Sederlund v.*

life estate be retained. Likewise it matters not that a deed of gift<sup>30</sup> was employed, with retention of possession<sup>31</sup> or of a life estate.<sup>32</sup> Similarly, motive is irrelevant.<sup>33</sup> To be sure, many cases purporting to utilize the "reality" theory add the caveat that there must be no "fraud."<sup>34</sup> But "fraud," in this context, may be a will-o'-the-wisp.<sup>35</sup> Probably most courts using the word have in mind a sham transaction, lacking reality. Even the word "illusory" is used with some frequency to denote a sham.<sup>36</sup>

The surviving spouse has prevailed against an inter vivos gift in a substantial body of cases.<sup>37</sup> Some of these cases use the illusory transfer theory, despite the seeming lack of logic in applying the "control" reasoning to inter vivos gifts. The cases favoring the surviving spouse may be placed in two groups:

Sederlund, 176 Wis. 627, 187 N.W. 750 (1922); *cf.* Sanborn v. Goodhue, 28 N.H. 48 (1853) (trust).

Note that the purchase of real estate may be used as a device for transferring personalty: *Holmes v. Holmes*, 3 Paige 363 (N.Y. 1832) (purchase of son's real estate at a price far beyond its value, with mortgage back not to be collected until death; held, valid).

<sup>30</sup> *York v. Trigg*, 87 Okla. 214, 209 Pac. 417 (1922); *Garrison v. Spencer*, 58 Okla. 442, 160 Pac. 493 (1916). Cases in which a deed of gift was held invalid as against the surviving spouse include the following: *Stone v. Stone*, 18 Mo. 389 (1853); *Davis v. Davis*, 5 Mo. 111 (1838); *cf.* *Tucker v. Tucker*, 29 Mo. 350 (1860), 32 Mo. 464 (1862) (trust); *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153 (1889).

<sup>31</sup> *E.g.*, *Garrison v. Spencer*, *supra*, note 32.

<sup>32</sup> *Wahl v. Wahl*, 200 S.W.2d 597 (Mo. App. 1947), *appeal transferred*, 357 Mo. 89, 206 S.W.2d 334 (1947); *cf.* *Robertson v. Robertson*, 147 Ala. 311, 40 So. 104 (1905); *In re Sides' Estate*, 119 Neb. 314, 228 N.W. 619 (1930).

<sup>33</sup> *E.g.*, *In re Kilgallen's Estate*, 123 N.Y.S.2d 827 (Surr. Ct. 1953); *cf.* Sawyer, "Gifts of Personal Property as Limited by the Rights of the Wife," 5 U. PITT. L. REV. 78, 88-90 (1939) (urging a return to the "intent" rationale in Pennsylvania).

<sup>34</sup> Sawyer, *supra*, note 18.

<sup>35</sup> *Supra*, pp. 140-143.

<sup>36</sup> *Hayes v. Lindquist*, 22 Ohio App. 58, 153 N.E. 269 (1926), discussed *supra*, p. 135; also see *Leonard v. Leonard*, 181 Mass. 458, 63 N.E. 1068 (1902).

<sup>37</sup> The burden is on the claimant to show that the subject-matter of the gift was the decedent's own property; *Lindsey's Executor v. Lindsey*, 313 Ky. 171, 230 S.W.2d 441 (1950).

(a) Decisions acknowledging frankly that the claimant wins because of the "unreasonableness" of the gift. For example it may be recalled that a line of Kentucky cases utilizes the following doctrine:

"If . . . a gift or voluntary conveyance of all or the greater portion of his property be made to his children by a former marriage without the knowledge of the intended wife, or it be advanced to them after marriage without the wife's knowledge, a *prima facie* case of fraud arises, and it rests upon the beneficiaries to explain away such presumption."<sup>38</sup>

(b) Decisions purporting to emphasize one or more of the following factors:

- (i) intent, i.e., motive<sup>39</sup>
- (ii) secrecy<sup>40</sup>

<sup>38</sup> *Murray v. Murray*, 90 Ky. 1, 13 S.W. 244 (1890). For discussion of the Kentucky cases, see pp. 112-114, *supra*. See also the following cases: (a) *Transfer Invalid*: *Smith v. Hines*, 10 Fla. 258 (1863-4); (b) *Transfer Valid*: *Smith v. Corey*, 125 Minn. 190, 145 N.W. 1067 (1914); *Wahl v. Wahl*, 200 S.W.2d 597 (Mo. App. 1947); *appeal transferred*, 357 Mo. 89, 206 S.W.2d 334 (1947); *In re Sides' Estate*, 119 Neb. 314, 228 N.W. 619 (1930); *Sederlund v. Sederlund*, 176 Wis. 627, 187 N.W. 750 (1922); *cf. Allender v. Allender*, 199 Md. 541, 87 A.2d 608 (1952).

In sustaining the claim of the surviving spouse, some of the Missouri cases comment on the fact that *all* of the decedents' property was transferred; *e.g.*, *Dyer v. Smith*, 62 Mo. App. 606 (1895); *Newton v. Newton*, 162 Mo. 173, 61 S.W. 881 (1901); *cf. Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902) (all but a "mere pittance"). In general, see p. 114, *supra*.

<sup>39</sup> See discussion of the Missouri cases, pp. 114-116, *supra*; also see *Smith v. Lamb*, 87 Ark. 344, 112 S.W. 884 (1908) (four days before death; some evidence of consideration); *Wilson v. Wilson*, 23 Ky. L. Rep. 1229, 64 S.W. 981 (1901); *cf. Cochran's Adm'x v. Cochran*, 273 Ky. 1, 115 S.W.2d 376 (1938); *Manikee v. Beard*, 85 Ky. 20, 2 S.W. 545 (1887); *Hummel's Estate*, 161 Pa. 215, 28 Atl. 1113 (1894); *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153 (1889). *But see In re Sides' Estate*, 119 Neb. 314, 228 N.W. 619 (1930); *cf. Sederlund v. Sederlund*, 176 Wis. 627, 187 N.W. 750 (1922).

<sup>40</sup> *Hastings v. Hudson*, 359 Mo. 912, 224 S.W.2d 945 (1949); *Rice v. Waddill*, 168 Mo. 99, 67 S.W. 605 (1902). *But see Sederlund v. Sederlund*, 176 Wis. 627, 187 N.W. 750 (1922). For a discussion of the secrecy factor, in connection with the early Colorado cases, see p. 135, *supra*.

- (iii) proximity to death <sup>41</sup>
- (iv) retention of possession, or of a life estate.<sup>42</sup>

The cases stressing retention of possession usually involve a continuation of active management or control.<sup>43</sup> To illustrate, we shall consider two cases involving a gift of an interest in a business. In *Marano v. Lo Carro* <sup>44</sup> the husband transferred ninety-nine of the one hundred shares in his own real estate company. Nevertheless, he continued to sign corporate checks, and drew some for his own use; managed the business; represented the company in negotiations; retained the corporate books and documents, and rendered no accounting to the donee, who in point of fact did not actually arrange for the issuance of shares to himself until after decedent's death. The inter vivos transfer — presumably valid aside from the widow's claim — was effected in a "written contract" that had been executed either just prior to or just subsequent to the marriage. The transfer was held "illusory."

<sup>41</sup> See the line of Missouri cases set out in Chap. 8, note 68, *supra*; *Smith v. Lamb*, 87 Ark. 344, 112 S.W. 884 (1908).

<sup>42</sup> *Smith v. Hines*, 10 Fla. 258 (1863-4); *Tucker v. Tucker*, 29 Mo. 350 (1860), 32 Mo. 464 (1862). In *Walker v. Walker*, 66 N.H. 390, 31 Atl. 14 (1891) the decedent surrendered his stock certificates and took new certificates in the name of his sons. He informed them of the "gift," without particularizing as to the securities or the amount, and took a power of attorney from them enabling him to collect the dividends, some of which he retained for his personal use. Two years before his death he transferred the certificates to a lawyer to hold in trust for the sons, but on the same terms as before. Held, invalid as to the widow, because a "mere device or contrivance" to "have the enjoyment and control of it for life." *But see Haskell v. Art Institute*, 304 Ill. App. 393, 26 N.E.2d 736 (1940) (gift of paintings to art institute upheld though made 3 months before death with possession retained for a year under a "lease," and with blatant intent to cut out wife); *Allender v. Allender*, 199 Md. 541, 87 A.2d 608 (1952); *Estate of Sides*, 119 Neb. 314, 228 N.W. 619 (1930) (gift of money, taking back negotiable notes to be cancelled on donor's death).

<sup>43</sup> See *Hastings v. Hudson*, 359 Mo. 912, 924, 224 S.W.2d 945 (1949); *cf. Mendez v. Quinones*, 78 F. Supp. 744 (D.C.P.R. 1948), *modified sub. nom. Mendez v. Mendez*, 176 F.2d 849 (1st Cir. 1949); *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791 (1919) (transfer of money and notes, "subject to the control and demands of decedent"; held, invalid).

<sup>44</sup> 62 N.Y.S.2d 121 (Sup. Ct. 1946), *aff'd without opinion*, 270 App. Div. 999, 63 N.Y.S.2d 829 (1st Dep't 1946).

In *Allender v. Allender*,<sup>45</sup> however, a Maryland court upheld a gift in which comparable control was retained. Here the husband surrendered his shares in a close corporation, and had them reissued in the joint names of himself and his children by a former marriage. The donees were unaware of the transfer until his death; and in the meantime he voted the stock and drew dividends. After flirting with the "degree" test, i.e., "reasonableness," although not so-called, the court stated that "the fact that the joint interest in the key stock of the decedent and his children was by law severable . . . was not such a reservation of dominion or title to the key stock as amounted to a violation of the widow's rights."<sup>46</sup>

The gift cases are an illogical lot, inexplicable in terms of prevailing rationales. As mentioned earlier, a semblance of order may be discerned if we scrutinize the apparent equities in each case. From that viewpoint the *Allender* case makes sense, as the transfer was probably reasonable in the light of known circumstances. On the other hand, the state of the equities in the *Marano* case is not clear: the transfer was substantial in amount, but the claimant married the decedent only seven months before his death.<sup>47</sup>

The model statute suggested in Chapter 22 affects all types of transfers, including inter vivos gifts, with avowed attention to the equities. The reliance interest of the donee, normally quite substantial in the gift cases, has salient recognition in the "cut-off" provisions. A three year cut-off date applies to transfers in which the decedent retained no substantial beneficial interest in the subject matter of the transfer; otherwise, the period is ten years.<sup>48</sup>

<sup>45</sup> 199 Md. 541, 87 A.2d 608 (1952).

<sup>46</sup> *Id.* at 550-51, 87 A.2d at 612. See Table D, *infra*, for further cases on a gift of an interest in a business.

<sup>47</sup> For an analysis of the equities in the evasion cases as a whole, see Chap. 11, *supra*.

<sup>48</sup> Suggested Model Decedent's Family Maintenance Statute, §8, *infra*, Chap. 22.

3. GIFTS CAUSA MORTIS <sup>49</sup>

A gift causa mortis is a revocable <sup>50</sup> inter vivos gift of personalty, made in apprehension of death <sup>51</sup> and for testamentary purposes. Under any solution to the evasion problem this juridic hybrid is peculiarly vulnerable to the widow's claim. It is very like a will, not only in its revocability but in other respects. The property passing by gift causa mortis is subject to the creditor's claim — assuming an insufficiency of assets in the estate <sup>52</sup> without any need to prove intent to defraud creditors. Also, on a perhaps questionable analogy to the doctrine of lapse, the gift causa mortis fails if, as is unlikely, the donee does not outlive the donor.

And yet the prescribed formalities pertain to the law of gifts; thus delivery is required. The orthodox view is that title passes immediately, subject to defeasance by subsequent acts and conditions such as claims of creditors, revocation, recovery of the donor, prior death of the donee. This notion as

<sup>49</sup> In general, see Pomeroy, EQUITY JURISPRUDENCE §§1146-51 (4th ed. 1918); Schouler, "Oral Wills and Death-bed Gifts," (1886) 2 L. Q. REV. 444; Mechem, "Delivery in Gifts of Chattels," 21 ILL. L. REV. 341, 356 (1926).

Gifts causa mortis (*donationes causa mortis*) were well known in Roman law. Delivery was required in the early law. Later on, however, this requirement was relaxed in some respects; and Justinian enacted that *donationes causa mortis* should be classified as legacies for almost all purposes. Inst. 2, 7, 1, translated 2 Scott, CIVIL LAW, 49 (1932). In general, see Buckland, TEXT BOOK OF ROMAN LAW 253-58, (2d ed. 1932); Buckland, MANUAL OF ROMAN PRIVATE LAW 150-52, (1925); Radin, ROMAN LAW 392-95, (1927); Scrutton, ROMAN LAW AND THE LAW OF ENGLAND, 92 (1885); Bordwell, "Testamentary Dispositions," 19 KY. L. J. 281, 286 (1931).

<sup>50</sup> The notion of revocability is in most cases academic, since changes of heart are unlikely before death; and if the donor recovers the gift is automatically rendered inoperative.

<sup>51</sup> Sports note: a Missouri court labelled a certain transfer a gift causa mortis even though the decedent went fishing several times after making the transfer. This, said the court, merely shows that "the ruling passion is strong in death." *Kerwin v. Kerwin*, 204 S.W. 925, 926 (Mo. App. 1918).

<sup>52</sup> The property transferred may be of considerable value, and need not be of tangible personalty. Thus the doctrine has been applied to commercial paper, securities, insurance policies, bank books and the like.

to the time of passage of title is a corollary of the view that the applicable formalities are those of gifts, not wills. Otherwise, if title passed at death, the formalities of the Wills Act would apply.

As far as cases dealing squarely with spouses' rights are concerned, the courts show no over-all bias in favor of either the surviving spouse or the donee. Cases favoring the spouse<sup>53</sup> tend to stress the resemblance to a will. Cases favoring the donee<sup>54</sup> emphasize the niceties of property law. Thus we find this statement in *Vosburg v. Mallory*:<sup>55</sup>

The donor at his decease is held to be already divested of his property in the subject of the gift, so

<sup>53</sup> *Railey v. Railey*, 30 F. Supp. 121 (D. C. D. Col. 1939) (only to extent that estate funds insufficient to meet widow's claim); *Hatcher v. Buford*, 60 Ark. 169, 29 S.W. 641 (1895); *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 100 N.E. 1049 (1913); *rehearing denied*, 55 Ind. App. 75, 102 N.E. 282 (1913); *Baker v. Smith*, 66 N.H. 422, 23 Atl. 82 (1891) (partial defeasance); *Kerwin v. Kerwin*, 204 S.W. 925 (Mo. App. 1918); *cf. Smith v. Lamb*, 87 Ark. 344, 112 S.W. 884 (1908) (bill of sale four days prior to death; gift causa mortis theory not mentioned in case); *Manikee v. Beard*, 85 Ky. 20, 2 S.W. 545 (1887) (factual situation similar to that of a gift causa mortis); *Dunn v. German-American Bank*, 109 Mo. 90, 18 S.W. 1139 (1891); *Jones v. Brown*, 34 N.H. 439 (1857); *Huber's Estate*, 25 Pa. Co. Ct. 370 (1901), *aff'd*, 21 Pa. Super. Ct. 34 (1902) (gift causa mortis not proven; strong dicta in original hearing regarding wife's rights).

In some cases the surviving spouse has prevailed against transfers that closely resembled gifts causa mortis, without any judicial comment on the resemblance; *e.g.*, *Haskell v. Art Institute*, 304 Ill. App. 393, 26 N.E.2d 736 (1940); *Manikee v. Beard*, 85 Ky. 20, 2 S.W. 545 (1887); *Nichols v. Nichols*, 61 Vt. 426, 18 Atl. 153 (1899); *Thayer v. Thayer*, 14 Vt. 107 (1842).

There is a line of Missouri cases that stresses the "contemplation of death" factor, apparently without insisting on the technical requirements of a gift causa mortis. The Missouri cases are discussed, *supra*, p. 114. Note particularly *Stone v. Stone*, 18 Mo. 390 (1853); *but cf. Brandon v. Dawson*, 51 Mo. App. 237 (1892) (caveat regarding proof of intent to defraud).

<sup>54</sup> *Vosburg v. Mallory*, 155 Iowa 165, 135 N.W. 577 (1912); *Weber v. Salisbury*, 149 Ky. 327, 148 S.W. 34 (1912) (surviving spouse otherwise reasonably provided for); *Lambert v. Lambert*, 117 Me. 471, 104 Atl. 820 (1918) (*quaere* if "fraud"); *Marshall v. Berry*, 13 Allen (Mass.) 43 (1866); *Chase v. Redding*, 13 Gray 418, 422 (Mass. 1859); *cf. Wilson v. Lowrie*, 77 Colo. 427, 236 Pac. 1004 (1925); *In re Clark's Estate*, 149 Misc. 374, 376, 268 N.Y. Supp. 253, 255 (1933) (tax case); *Brunson v. Brunson*, 19 Tenn. 627 (1838) (advancements).

<sup>55</sup> 155 Iowa 165, 135 N.W. 577 (1912).

that no right or title in it passes to his personal representatives . . . that the wife may thereby evade the provision of the statute, which disables her from depriving her husband of more than half of her personal estate by her will . . . may be equally urged against any disposition of it in her lifetime. . . . If the legislature intended that the wife should be restricted in this respect, it would have been so declared.

In the *Vosburg* case the equities favored the donee; and the court stated that it reached its "satisfactory conclusion," because "no fraud was intended. . . ." The saving clause "no fraud being intended" is found in a few other cases.<sup>56</sup> Here again we usually have no clue as to whether fraud refers to shams, to malicious transfers, or to some other sort of transfer.

It should not be assumed from the foregoing that the courts are indifferent to the quasi-testamentary nature of the gift *causa mortis*. There are a number of additional cases in which the donee prevailed on the apparent reasoning that the transfer concerned was a gift *inter vivos* instead of a gift *causa mortis*.<sup>57</sup> One senses from these cases that many of the courts concerned were quite willing to concede that a gift *causa mortis* would *per se* be vulnerable to the widow's claim.

It is possible that the cases in the last-mentioned group are decided essentially on the equities of the individual case. Certainly the distinction between a gift *inter vivos* and a gift *causa mortis* is a thin one. But we cannot be sure. The necessary factual data are not always given; and the alleged rationale tends to evade the issue.

<sup>56</sup> *E.g.*, *Lambert v. Lambert*, 117 Me. 471, 104 A. 820 (1918); *Brandon v. Dawson*, 51 Mo. App. 237 (1892).

<sup>57</sup> In some cases the surviving spouse lost because the instrument was deemed not to be a gift *causa mortis*. *West v. Miller*, 78 F.2d 479 (7th Cir. 1935), *cert. denied*, 296 U.S. 633 (1935) (*inter vivos* trust); *Harmon v. Harmon*, 131 Ark. 501, 199 S.W. 553 (1917) (equities against surviving spouse); *Delta & Pine Land Co. v. Benton*, 171 Ill. App. 635 (1912) (*inter vivos* trust); *cf. Stark v. Kelley*, 132 Ky. 376, 113 S.W. 498 (1909) (gift by bachelor); *In re Kilgallen's Estate*, 204 Misc. 558, 123 N.Y.S.2d 827 (Surr. Ct. 1953); *Sanborn v. Goodhue*, 28 N.H. 48 (1853) (*inter vivos* trust); *York v. Trigg*, 87 Okla. 214, 209 Pac. 417 (1922) (deeds and contracts).

A similar criticism may be made of some of the cases directly favoring the spouse. We find an unrealistic stress on the time at which "title" is said to pass. As was said by an Indiana court:

There is authority for the statement that a gift *causa mortis* vests title in the donee conditionally at the time of delivery and that where the donor dies without revoking such gift, the vesting of the property relates back to the time of the delivery thereof; but on the other hand, there is abundance of authority to the effect that a donor who makes a gift *causa mortis* remains seized or possessed of the property until death, within the meaning of a statute giving dower in personal property of which he dies seized.<sup>58</sup>

Policy-wise, gifts *causa mortis* should receive just about the same treatment as gifts *inter vivos*. Certainly the gift *causa mortis*, of all transfers, should not be immune to the widow's claim. As was said in *Crawfordsville Trust Co. v. Ramsey*, "we do not think that 'modern business' will have to do very frequently with gifts made in *extremis* by a donor who gives because he knows and fully realizes that he is affected with a disease from which he *cannot* recover, the gift being conditioned on the event of his death . . . because the donor . . . learns that his widow may defeat the [will] to the extent of her one third interest therein."<sup>59</sup> Nor has the donee any justifiable complaint. His reliance interest is thin, as his "ownership" is conditional and necessarily of short duration. Indeed, if other things are equal the lack of any reliance interest should militate against such a donee. Under an equitable marshalling of the assets he could be called on for contribution to the widow in advance of other *inter vivos* transferees.

But other things may not be equal. There may be situations when the donee of the gift *causa mortis* should prevail

<sup>58</sup> *Crawfordsville Trust Co. v. Ramsey*, 55 Ind. App. 40, 70, 100 N.E. 1049, 1060 (1913); but most of the cases cited for this proposition did not involve a surviving spouse. Cf. *Jones v. Brown*, 34 N.H. 439 (1857).

<sup>59</sup> 55 Ind. App. 40, 78, 102 N.E. 282, 283 (1913).

even over the spouse, as where the decedent thereby effected reasonable settlement on dependent children of a prior marriage. And in no event should the spouse win if she has no need. In a word, the gift *causa mortis* cases should be decided by the maintenance and contribution formula. The equities should be the avowed basis of decision. On this approach there would be no excuse for employing the "title" phraseology to describe the result; nor would it be possible to defeat a meritorious claim by calling the transfer a gift *inter vivos*, instead of a gift *causa mortis*.

By way of postscript, may an irrevocable trust be considered a gift *causa mortis*? The problem stems from the fact that in some jurisdictions an irrevocable trust is virtually impregnable, as far as the widow is concerned.<sup>60</sup> A gift *causa mortis* may, of course, be made in trust, in which event the rules as to gifts *causa mortis* would apply.<sup>61</sup> But could an irrevocable trust, when made in contemplation of death, possibly be characterized as a gift *causa mortis*? Fonblanque, in discussing the custom of London cases, felt that a deed made while the grantor is languishing "ought to be looked upon as a *donatio causa mortis*."<sup>62</sup> Lacking the power to revoke, however, or an arrangement that the trust be subject to a condition subsequent of termination upon the recovery of the settlor, it would appear that the widow would not get far on the gift *causa mortis* analogy.<sup>63</sup> Indeed, in a cryptic

<sup>60</sup> See *infra*, Chap. 13:3.

<sup>61</sup> Bogert, 1A TRUSTS AND TRUSTEES, §142, note 17 (1951); and see Baker v. Smith, 66 N.H. 422, 23 Atl. 82 (1891).

<sup>62</sup> Quoted in Stone v. Stone, 18 Mo. 390, 392 (1853).

<sup>63</sup> Reservation of the income for life and any degree of control over administration would also tend to negative consciousness of impending death.

In Delta & Pine Land Co. v. Benton, 171 Ill. App. 635 (1912), a transfer of shares of stock, in trust for a granddaughter, was taxed as being in contemplation of death. In holding that it was not a gift *causa mortis*, the court stated that "a gift, although made in contemplation of death, is a gift *inter vivos*, if the donor manifests an intention that the gift shall be absolute, irrevocable and effective *in praesenti*, cannot be questioned." Cf. Robertson v. Robertson, 147 Ala. 311, 40 So. 104 (1905)

Colorado decision the court sustained a transfer in trust "causa mortis" that had been made with intent to deprive the widow of her inheritance.<sup>64</sup>

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(irrevocable trust of bonds, made while husband allegedly "in a low state of health," sustained against widow).

<sup>64</sup> *Wilson v. Lowrie*, 77 Colo. 427, 236 Pac. 1004 (1925); but there is no discussion of the sense in which "causa mortis" was used.